S. Notices

1944

File No. 44

Legal Department

A BRANCH

Subject:—

Papers Relating to

Notices of intended suits

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Mr. M.J. Kulkarni, who gives the notice under section 80, Civil Procedure Code, lives at Dharwar and his family lands are in Belgaum District.. In para. 1 of the notice he states that he has been deprived of the use of the produce of his lands on account of (i) the purchases made by the Collector and (ii) the restrictions against removing the grains outside the Belgaum District. On a question of fact the F.D.(Supply) note points out that sales of agricultural produce to the Collector in the Belgaum District are on a voluntary basis. Mr. Kulkarni hence should have no grievance in respect of the Collector's purchases.

In para 2 of the notice Mr. Kulkarni states that on account of his said deprivation of the produce of his lands he has been compelled to buy his requirements from the ration shops where, according to him, the quantity is 'mergre' and quality 'low'. He alleges that this has resulted in extra expense to him of Rs. 3,000/- which amount he claims as damages from Government. It may be observed that had Mr. Kulkarni alleged that he had suffered loss either because he had to pay an excessive price for his own requirements or because his goods fetched less in the market than what they would have done if the transport restrictions were not there, his allegations would at least have been plausible,though whether ultimately they could have been sustained or not is a different matter. But it is clear that so far as the present allegations are concerned there is no possible connection between buying in the ration shops and the montary loss described. Mr. Kulkarni thus omits to state any cause of action for an action for damages.

In paras. 3 and 4 of the notice it is contended that the Defence of India Rules which lay down the transport restrictions are ultra vires section 72 of the Government of India Act, 1915 and the queen's Proclamation, 1858. The grounds for this contention are set out in paras. 5 to 7 of the notice: (1)

91) Under section 72 the Governor General has the power to make Ordinances in cases of emergency, but that power is subject to the like restrictions as the power of the Indian Legislature to make laws,(2) Undersection 65 of the Act of 1951 the Indian Legislature had not power to make any law affecting any part of the unwritten laws of the United Kingdom, (3) 'Rights to personal freedom and of property' have been held to be protected under the said provision in section 65; 6 B.L.R. 392 and 40 Cal391(4) The Defence of India Rules'offend against the rights to freedom and of property'.

Section 72 of the Government of India Act, 1915 is one of the sections continued for the time being by section 317 and the Nineth Schedule to the present Act. The Defence of India Ordinance, 1939 was accordingly Promulgated under the said section 72 and the Defence of India Rules were originally made and published on 3rd September 1939 under powers conferred by the Ordinance. The Defence of India Act, 1939 was passed on 29th September 1939 and by section 21 thereof it superseded the Ordinance and further provided that the rules made under the Ordinance 'shall be deemed to have thus been given statuatory authority. Mr. Kulkarni is evidently under a misapprehension in contending that their authority is still the Ordinance. See Niharendu Dutt V. The King Emperor 1942 F.C.R. 38 at pp 42-43.

Mr. Kulkarni's next contention is equally misconceived. The relevant provision in section 65 of the former Government of India Act ran as follows: The Indian Legislature "has not power to make any law affecting the authority of Parliament, or any part of the unwritten laws or constitution of the United Kingdom [illegible] of Great Britain and Ireland whereon may depend in any degree the allegiance of any person to the Crown of the United Kingdom, or affecting the soverignty or dominion of the Crown over any part of British India."

'In the matter of Ameer Khan' 6 Beng. L.R.392 on which Mr. Kulkarni relies was a habeas Cropus case. Ameer Khan had been detained under a warrant issued in the form prescribed by Regulation III of 1818. It was contended on his behalf in the High Court that Act III of 1858 which had extended the effect of the Regulation to Calcutta derived its power from the Statute 3 and 4 William IV, c. 85, S. 43, but went beyond the provisions of the latter-those provisions being similar to section 65(2) of the Government of India Act, 1915 as reproduced above. At page 450 to 455 of the report the High Court has considered t what is 'allegiance' and the expression &unwritten laws and constitution of the United Kingdom. It held that Act III of 1858 was not ultra vires the Indian Legislature. "The principles which justify the temporary suspension of the Habeas Cropus Act in England Justify the Indian Legislature in entrusting to the Governor General in council an exceptional power of placing individuals under personal restraint when, for the security of the British Dominions from foreign hostility, and from internal commotion, such a course might appear necessary to the Governor General in Council." It would thus be seen that Mr.Kulkarni can derive no support either from section 65 or the authority relied upon by him.

Theother case referred to by Mr. Kulkarni is Secretary of State v. Menon 40 Cal 391. There the Privy Council decided that "the effect of section 65 of the Act of 1858 was to debar the Government of India from passing any act which could prevent a subject from suing the Secretary of State in Council in a Civil Court in any case in which he could have similarly sued the East Indian Company". Accordingly a Burma Act which had enacted that "no Civil Court shall have jurisdiction to determine any claim to any right over land as against the Government" was ultra vires of the Lt. Governor of Burma in Council.

Neither section 65 of the Act of 1916 nor the two cases mentioned by Mr. Kulkarni are in point here. Sections 99 to 107 of the present Government of India Act describe

the extent and Distribution of the legislative powers of the various Indian Legislatures. The restrictions on the legislative powers are stated in sections 108 to 110. The provision in section 65 of the old Act as reproduced above is not to be found in the new ~~Ex~~ Act. The position therefore is that within the limits set by the present Act the Indian Legislature has pleannary powers of legislation: Queen v. Burah (1878) 3 A.C. 889 etc. Therefore once it is found that a particular topic of legislation is among those upon which the Indian Legislature may competently legislate there is "no reason to restrict the permitted scope of such legislation by any other consideration than is applicable to the legislation of a fully soverèign state" (Croft.V. Dumphy 1933 A.C 156). Thevalidity of the Defence of India Act from this point of view has been decided in Niharendu Dutt v. King Emperor 1942 F.C.R. 38 Emperor v. Keshav Talpade 56 Bom. L.R. (F.C.) and Harkishan Das v Emperor A.I.R. 1944 Lah. 33 The orders of which Mr. Kulkarni complains were made under Defence of India Rule 81'2)(a) which in turn derives authority from section 2(2) (XX) of the Defence of India Act. Rule 81(2)(a) has expressly been held intra vires by the Bombay High Court in Emperor v. Hansraj 46 Bom. L.R. 529 . This decision is conclusive so far as Mr. Kulkarni's present contentions are concerned.

Under rule 114(4) of the L.O. Rs. the Collector of Belgaum to whom the notice has been addressed need not take any action upon it.

Sd/- PNM

o.c. 9/11/44

Remembrancer of Legal Affairs.

U.R. to F.D. (Supply), No 7858, dated 10th November 1944.

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Office of the R.L.A.

Mr. Karimbhoy was the owner of a bungalow at Santacruz. Water was supplied to him by the P.W.D. through a meter fixed in his compound. On or about 20th July 1939 a P.W.D. Officer discovered that an unauthorised connection had been led off the Government main to the bungalow, so that water reached Mr. Karimbhoy's premises without passing through the meter. Mr. Karimbhoy was thereupon prosecuted for theft of water. His defence was that the unauthorised connection had been made without his knowledge by his divorced wife Fatma, who had then given the information to the P.W.D. authorities with the intention of geeting him into trouble. The accused was convicted by the Magistrate, but acquitted in appeal in the court of Sessions at Thana.

2. After the acquittal it was found that the water dues could not be recovered as arrears of land revenue, and under those circumstances the R.L.A. gave an opinion that "the only feasible course would be to cut off the connection and/or file a suit against Mr. Karimbhoy for recovery of water charges." A demand of Rs. 2290/6/- was made upon Mr. Karimbhoy on or about 10th May 1943 and at the same time the water connection was cut off. On 15th October 1943 however Mr. Karimbhoy paid the demand under protest and the connection was reopened.

3. A notice of suit for refund of the amount of the ground that it was illegally recovered as also for damages of Rs. 1500/- has now been received by the P.W.D. The amount recovered consisted of two items:(1) Rs. 1416/- representing water charges from 1st January 1939 to 31st December 1941, and (2) Rs. 874/6/- being the expenses incurred by the P.W.D. for having the illegal connection watched with a view to preventing its being tampered with from 20th July 1939 till 28th October 1940 when it was inspected by the City Magistrate, Bandra. The P.W.D. have no doubtthat the suit if filed can bedefended in respect of the item of Rs. 1416/- and in respect of the claim of Rs. 1500/- for damages. The legality of the demand and recovery of the remaining item of Rs. 874/6/- appears however

doubtful to that department and on this point the R.L.A's opinion is sought under rule 144(3).

4. The expenses of Rs. 874/6/- were incurred by the P.W.D. in respect of the keeping of a watchman at the site till the Magistrate should inspect it. The guard remained there for over 13 months and the monthly expenses were approximately Rs. 60/- All this was done by the Department on account of its anxiety to preserve the evidence of the alleged offence for the inspection of the Magistrate. Now the first objection to the demand of these expenses from Mr. Karimbhoy is that Government had no legal right to recover expenses more in connection had no legal right to recover expenses in connection with a criminal trial, more so when the prosecution failed. Besides, the expenses cannot be reasonably connected with the criminal trial. What the Magistrate saw on 5th October 1940 could not by itself have been evidence of facts existing on 20th July 1939 when the unauthorised connection was discovered. There was other evidence about them. Therefore, the expenses incurred for the so called preservation of evidence cannot be considered necessary for the purposes of the criminal trial. The demand and recovery of Rs. 874/6/- cannot therefore be supported in a court of law. Theopinion of the District Government Pleader, Thana, in this respect is correct (vide pages 126 and 131 of file).

with case papers

Sd/- P.M.Koos
23/1/45
O.C. Remembrancer of Legal Affairs.

U.R. to P.W.D. No. 710, dated the 23rd January 1945.

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